In the Supreme Court of the United States

EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY.
Plaintiff in Error,
vs.
C. D. McKEMY,
Defendant in Error.

No. 1355.
October Term, 1889.

WRIT OF ERROR TO THE SUPREME COURT OF TENNESSEE.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

On the 5th October, 1882, C. D. McKemy filed his declaration against appellant, the substance of which is that he was a servant of appellant, and under the control of officers and servants of the appellant, who were his superiors; and that by reason of the negligence, carelessness and unskillfulness of the appellant and of its said superior servants, he was injured.

The appellant pleaded, first, not guilty; second statute of limitations; and third, that plaintiff's own negligence caused the injury.

There was a trial upon these issues in March, 1883, resulting in a verdict and judgment of $8,000 for plaintiff.

At the September term, 1883, of the Supreme Court of the State of Tennessee, this verdict, and the judgment, were set aside for want of evidence to support it, and the cause remanded.

On June 9th, 1884, an amended declaration was filed, charging a particular or special negligence in this; that appellant, without due care, employed in its service, one White, and retained him after it knew, or by due care ought to have known, of his incompetency; by reason of which, coupled with said White's incompetency, plaintiff was injured.

To this appellant pleaded not guilty.

There was then a second trial, resulting in a verdict and judgment in favor of plaintiff for $7,000.

Upon appeal to the Supreme Court of Tennessee that Court (to-wit September 22nd, 1886), again set aside the verdict and judgment, because unsupported by the evidence, and remanded the cause.

The cause was again tried in June, 1887, resulting in a verdict and judgment in favor of plaintiff for $5,000.

The case was again appealed to the Supreme Court, and among other errors, the following was assigned: "Because the statute, being section 3122 of the Code of Tennessee of 1858, * * * is unconstitutional and void, and is in violation * * * of section 1 of article fourteen of the amendments to the Constitution of the United States."

The Supreme Court refused to reverse for *any error assigned*, its final judgment being as follows:

"It appearing to the Court that the evidence is *wholly insufficient to support the verdict* in this cause, but that there is no error in the action or ruling of the Circuit Judge, as shown in the record of this cause, and that there was no error in the refusal of said Circuit Court to grant a new trial in this case, for the reason that section 3122, Code of Tennessee (1858) prohibits the granting of more than two new trials in any cause for errors of fact; that said statute

is binding upon this Court, *and is not in violation of the Constitution of the United States*, or of the State of Tennessee; and that under said statute this Court has no power to grant a new trial of the cause: *therefore, by reason of the prohibition contained in said statute*, and *for that reason alone*, it is ordered and adjudged that the judgment of the Circuit Court of Knox county in this cause be in all things affirmed."

Thereupon judgment was entered up for said $5,000, interest and costs, and execution awarded.

Said section 3122 of the Code of Tennessee (1858) is as follows:

"Not more than two new trials shall be granted to the same party in an action at law or upon the trial by jury of an issue of fact in equity."

ASSIGNMENTS OF ERROR.

1. The Supreme Court of Tennessee erred in holding that section 3122 of the Code of Tennessee does not violate the fourteenth amendment to the Constitution of the United States.

2. The Supreme Court of Tennessee erred in holding that a judgment upon a third verdict under section 3122 (having no sufficient evidence to sustain it) is due process of law.

3. The Supreme Court of Tennessee erred in refusing to set aside said verdict and judgment, because the same was obtained in violation of the fourteenth amendment of the Constitution of the United States.

QUESTION STATED.

Briefly stated, the question is this:

The Fourteenth Amendment to the Constitution of the United States provides that no State shall pass any law which shall deprive any person of life, liberty or property, without due process of law.

The Code of Tennessee, section 3122, provides that no more than *two* new trials shall be granted to the same party in an action at law.

The Supreme Court of Tennessee holds this section to mean that no more than two new trials shall be granted to the same party, *on the facts*, where two juries have found the same way:—there being no error in the charge or rulings of the trial judge.

Iron Co. vs. Dobson, 15 Lea, p. 416.

In the case at bar, the Supreme Court has set aside two verdicts, reversed the judgments pronounced thereon, and remanded the cause, *because unsupported by the evidence.*

A third verdict having been given, and an appeal prayed, the Supreme Court refuse to set the third verdict aside. The Court finds that the evidence is *wholly insufficient to support the verdict, but by reason of the prohibition contained in said section 3122, and for that reason alone*, they refuse to disturb it, and affirm the judgment entered up on said verdict and award execution for $5,000 and costs: they *further adjudge that section 3122 of the Tennessee Code is not violative of the provisions of the XIVth Amendment.* Has the plaintiff in error been deprived of its property by due process of law?

ARGUMENT.

The Fourteenth Amendment to the Constitution of the United States provides, among other things: "Nor shall any state deprive any person of life, liberty or property, without due process of law."

This limitation upon the powers of the States which was added as an amendment to the Federal Constitution, contains no new doctrine. Nearly every State Constitution contains a similar provision of limitation upon the powers of their respective legislatures. The Constitution of Tennessee provides (Art. 1, Sec. 8): "No man * * * shall be deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land."

"The law of the land" is held by the courts of Tennessee to be the equivalent of "due process of law."

Staten vs. State, 6th Cold., 244.

Knox vs. State, 9th Bax., 207.

In the 6th Coldwell case (supra) this language is used: "The due process of law, or the law of the land by which a person may be deprived or divested of his properties * * * is not an act of the legislature * * * other than a proceeding wherein a party whose right is involved can have, or is authorized to have, a hearing, and to make defense. A definition given by Mr. Daniel Webster of "due process of law," has been much commended. The law of the land, or due process of law, he says: "Is the general law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under general rules which govern society." (4 Wheat., 519.) Mr. Justice Edwards (12 N. Y. Reps., 209) defines the rule thus: "Due process of law, undoubtedly means in the due course of legal proceedings, *according to those rules and forms which have been established for the protection of private rights.*" Mr. Justice Johnson, of the Supreme Court of the United States, says: (4 Wheaton, 235) "As to these words from Magna Charta, after volumes spoken and written, with a view to their exposition, the good sense of mankind has settled down to this, that they were intended to secure the individual from the *arbitrary* exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. Mr. Cooley * * * in the course of his discussion and explanation of the rule "due process of law," says: We shall find that *general rules may sometimes be as obnoxious as special, when in their results they deprive parties of their vested rights.* While every man has a right that his own controversies shall be judged by the same rules which settle those of his neighbors, the whole community is also entitled, at all times, to

demand the protection of those ancient principles which shield private rights against *arbitrary interference, even though such interference may be under a rule impartial in its application. It is not the partial character of the rule so much as its arbitrary and unusual nature*, which condemns it as *unknown to the law of the land.*" Cooley's Const. Lim. (1st Ed.) 355.

In the same volume of reports, (6th Coldwell) at page 228, the following language may be found in the case of *Reynolds vs. Baker and others:* "A statute which attempts to take from one person his private property against his will, and bestow it upon another person for his private use, is universally held to be unconstitutional and void. It is a clear violation of that clause of the Bill of Rights, which ordains that no freeman shall be deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land. Const. Art. 1, Sec. 8. * * * A legislative act which undertakes to deprive one person against his will of a vested estate, and to vest it in another for his private use, is not due process of law, or the law of the land. It is an attempt by the Legislature to exercise a power which that branch of the government does not possess, and which it is prohibited to exercise. Due process of law means, in the due course of legal proceedings, according to the rules and forms *which have been established for the protection of private rights.*"

See also, *Scott vs. Toledo*, 22d A. & E. Corp. Cases, p. 479.

Definitions are of little avail in arriving at the true meaning of this provision of the Constitution. Each case must stand upon its own facts. Judge Cooley in his "Constitutional Limitations," says: "If we examine such definitions of these terms as are met with in the reported cases, we shall find them so various, that some difficulty must arise in fixing upon one which shall be accurate and complete in itself, and at the same time appropriate in all the cases.

The diversity of definition is certainly not surprising, when we consider the diversity of cases for the purposes of which it has been attempted, and reflect that a definition that is sufficient for one case and applicable to its facts may be altogether insufficient or entirely inapplicable in another." (2nd Ed. No. 353). He quotes with approval Mr. Webster's definition, in which it is said: "Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land." (No. 354). Again, at page No. 357, he affirms the principle that "there is no rule or principle known to our system, under which private property can be taken from one person and transferred to another for the private use and benefit of such other person whether by general law or special enactment."

In the case of Davidson vs. New Orleans, (96 U. S. 101–105) Justice Miller, for the Court, says, that in ascertaining the intent, meaning and application of the phrase, it should be done by the process of judicial exclusion and inclusion as the cases presented may require. In the same case, Justice Bradley gives the most accurate, comprehensive and satisfactory definition to be found in either treatises or decisions. His exact language is as follows: "I think, therefore, we are entitled under the fourteenth amendment, not only to see that there is some process of law, but due process of law, provided by the State law, when a citizen is deprived of his property; and that in judging what is due process of law, respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable, or advisable in the special case, it will be adjudged to be 'due process of law;' but if found to be *arbitrary, oppressive and unjust*, it may be decreed to be not due process of law." (96 U. S. 620.)

In one of the later cases, decided by the Court where the meaning of the phrase "due process of law" was involved, the Court, by Justice Miller, says: "This phrase, 'due process of law,' has always been one requiring construction; and as this Court observed long ago, never has been defined, and probably never can be defined, so as to draw a clear and distinct line, applicable to all cases, between proceedings which are by due process of law, and those which are not."

Freeland vs. Williams, 131 U. S. 405–425.

In ex parte, Virginia, 100 U. S. 346, the Court says:

"A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provisions, therefore, must mean that *no agency of a State*, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of a public position under a State government, deprives another of property, life or liberty, without due process of law, violates * * the Constitutional inhibition; and, as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the Constitutional provision has no meaning."

In the latest case, probably, which has been before this Court—Dent vs. State of West Virginia, 129 U. S. 114—Justice Field says: "As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms due process of law a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as are forbidden. * * * They were deemed (in England) to be equivalent to the law of the land. In this country, the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his pro-

perty. * * * The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation, affecting the rights of the citizen."

In "Spear on the Law of Federal Judiciary," it is said that "It is the province of courts to define the phrase and thus to determine what is and what is not due process of law; but the meaning, whatever it is, was made part of the Constitution of the United States, when the Fifth Amendment was ratified.

The Fourteenth Amendment establishes the same provision, and with the same meaning in respect to the State governments. *This is unquestionably an adoption of so much of the common law as is involved in due process of law.* (p. 698.)

In Munn vs. Illinois, 94 U. S., 115, Chief Justice Waite says: "A person has no property, no vested interest in any rule of the common law. That is only one of the forms of the municipal law, and is no more sacred than any other. * * * The law itself, as a rule of conduct, may be changed at the will or even the mere whim of the legislature, *unless prevented by constitutional limitations.*"

In "Broom's Commentaries on the Common Law," it appears that from time immemorial the common law has been and is, that while it is undoubtedly true a jury may persist in finding on any issue contrary to the expressed opinion, and direction of the judges, if this is made to appear to the Court in Banc, the verdict may be set aside as being against the evidence, and perverse.

Broom's Com. (4th ed.) pp. 199 and 206.

In mere matters of procedure, it is conceded that the legislature may make any changes it may see proper, so long as the fundamental principles of due process of law are not violated. To ascertain what these fundamental principles are we must look to the common law as it existed when this country separated from England.

The language of some of the judges quoted above indicates what these principles are. The fundamental principles of justice cannot be violated, nor can the arbitrary will of the legislature be substituted for the sworn duties, responsibilities, and prerogatives of the courts. If this were not so, as Mr. Webster well says: "Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for the courts to administer, or men to live under. The administration of justice would be an empty form, an idle ceremony. *Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country.*"

Webster's Works, vol. 5, p. 487.

In the Railroad Tax Cases, Justice Field uses this language: "By due process of law is meant one which, following the forms of law, is appropriate to the case, and *just to the parties to be affected.* It must be pursued in the *ordinary mode prescribed by law;* it must be adapted to the end to be obtained; and it must give to the party to be affected an opportunity of being heard respecting the justice of the judgment sought. Without these conditions entering into the proceeding, it would be anything but due process. If it touched life, or liberty, it would be wanton punishment, or rather wanton cruelty; if it touched property, it would be arbitrary exaction. It is significant that the guaranty against the deprivation of property without due process of law is contained in the clause which guarantees against a like deprivation of life and liberty; and it means that *there shall be no proceeding against either without the observance of all the securities applicable to the case* recognized by the general law, *by those principles which are established in all constitutional governments for the protection of*

private rights. * * * * * * * If life and liberty are involved, *there must be a regular course of judicial proceedings;* so also where the title or possession of property is in contention."

13 Fed. Rep., 751–752.

In the leading case of Hoke vs Henderson, 4th Dev. Law (S. C. 25 Am. Dec. 686) Chief Justice Ruffin reasons as follows: "Whenever an act of the Assembly, therefore, is a decision of titles between individuals, or classes of individuals, although it may in terms purport to be the introduction of a new rule of title, it is essentially a *judgment* against the old claim of right, which is not a legislative but a judicial function. It may not be easy to distinguish those powers, and to define so that an act shall be seen at once to be referable to the one or the other."

"But I think that where a right of property is acknowledged to have been in one person at one time, and is held to cease in him, and to exist in another, whatever may be the origin of the new right in the latter, the destruction of the old one in the former is by *sentence*."

In *Brown vs. Hummel*, 6 Penn. St. 86 (S. C. 47 Am. Dec., 431), Coulter, J., says: "The law of the land means the law of the individual case, as established in a fair and open trial, or an opportunity given for one, in court and by due course and process of law. It secures to the individual his private rights, unless they are taken from him by a trial, where he has an opportunity of being heard by himself, his counsel and his testimony *more majorum*, according to the laws and customs of our fathers and the securities and safeguards of the Constitution. * * * I do not therefore regard an act of the Assembly by which a citizen of Pennsylvania is deprived of his legal right as the law of the land."

In Taylor vs. Porter, 4 Hill, 140 (S. C. 40 Am. Dec., 275 and note), the Supreme Court of Errors and Appeals of

New York uses this language: "The meaning of the section is that no member of the State shall be disfranchised, or deprived of any of his rights and privileges, unless the matter shall be adjudged against him *upon trial had according to the course of the common law.* It must be ascertained judicially that he has forfeited his priviliges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. *It cannot be done by mere legislation.* * * * But when one man wants the property of another, I mean to say that the legislature cannot aid him in making the acquisition."

Due process of law means, according to the course and usage of the common law.

2nd Kent's Com., 13.
University vs. Williams, 4 Gill. & J., 412.
(S. C. 31 Am. Dec., 72)
Wallys Heirs vs. Kennedy, 2 Yerg., 554.
(S. C. 24 Am. Dec., 511.)

This necessarily implies that where there is a jury trial neither the common law rights and powers of either the judge or jury shall be arbitrarily snatched from them, nor shall they or either of them be made the senseless automatons to do the legislative will, instead of exercising their own judgments and consciences to do justice according to the law and the facts.

The reports are not wanting in instances in which the courts have declared legislative acts void because not due process of law, where legislatures have undertaken to arbitrarily substitute their judgment for that of court or jury, or have attempted to deprive the citizen of some of the securities and safeguards for the protection of private rights and property, which we have inherited, through our forefathers, from the common law.

In *Wright vs. Cradlebaugh, 3rd Nevada, 349*, it was held that the legislature had no power to restrain a defendant

from setting up a good defense; that to constitute due process of law it is not only necessary that a party be properly brought into court, but that he shall have the opportunity to establish any fact which, according to the usage of the common law or the provisions of the Constitution, would be a protection to his property; and that under the guise of regulating the mode of pleading and conducting a trial the legislature cannot deprive a party of a substantial right.

In *O. & M. R. R. Co. vs. Lackey, 78 Ill., 55*, an Illinois statute making a railroad company liable for all burial expenses and coroners' fees incurred in all cases where one might die or be killed in the cars of such railroad company was held unconstitutional and void, as attempting to impose a liability upon a railroad company where it had been guilty of no negligence and had violated no law, i. e. without due process of law.

In *Ziegler vs. S. & N. Ala. R. R. Co., 58 Ala.. 594*, an Alabama statute which made a railroad company responsible under all circumstances for injury to cattle, whether with or without negligence, was declared void.

The court held that an act which fixes a liability absolutely upon a railroad company for injuries done to property in the prosecution of its lawful business, whether with or without fault, is void.

In *Jensen vs Union Pacific R. R. Co., 21 Pac. Rep., 994*, the act of March 3rd, 1884 (Utah), providing that every railroad corporation within the territory which shall cause injury to or the death of any live stock by running against it with an engine, shall be liable for the injury, attempts to impose liability regardless of any fault in the corporation, and is therefore void under Constitution of United States, Amendment XIV, because not due process of law.

A similar statute was held unconstitutional and void for the same reasons in the cases of *Bielenberg vs. Montana Union*

R. R. Co., 20 Pac. Rep., 314, and Cottrell vs. Union Pac. R. R. Co., 21 Pac. Rep., 416.

In the case of the State vs. Beswick, 13 R. I., 211, a statute was passed upon, which declared that the notorious character of the premises, or the bad character of the persons frequenting them, should be *prima facie* evidence that liquors were kept there for sale. The court held that the statute was unconstitutional, because violating the provision that no one should be deprived of his life, liberty, or property, except by the judgment of his peers, or the law of the land; that the statute took away from the jury the right to pass upon the guilt of the accused; that to hold that the legislature can create artificial presumptions of guilt, is to hold that it may take away from a judicial trial the very element which makes it judicial. "To so hold," the Court says, "is to hold that the legislature has the power to bind and circumscribe the judgments of courts and juries, in matters of fact, and in an important measure to predetermine their decisions and verdicts for them."

In *People vs. Lyon*, 27 Hun., 180, it was held that a statute providing that whenever any person is seen to drink spirituous liquors in any place in which they are forbidden to be drunk, it shall be *prima facie* evidence of defendant's guilt, such a declaration means that the jury must convict, unless the defendant explains away this evidence; and if they can declare a fact to be *prima facie*, it would seem to follow that they might declare it *conclusive evidence*."

In the case of the *State vs. Divine*, 4 Southeastern Rep., 477, the Supreme Court of North Carolina, pronounced section 2329 of the N. C. Code void because it provided that whenever any live stock shall be killed by the engines or cars of the railroads in certain mentioned counties, and such killing is proved, it shall be *prima facie* evidence of negligence in any indictment against the president, receiver or superintendent of such railroad company; the court held

that this statute subverts the presumption of innocence, and therefore is not sanctioned by the constitution; that is, that it deprives a man of his liberty or property without due process of law.

In Tennessee, by constitutional provision, "Judges shall not charge juries with respect to matters of fact, but may state the testimony, and declare the law." Article VI., section 9. The purpose of this provision was to change the common law, only in respect to the power of a *nisi prius* judge to "sum up the evidence," as understood and practiced in Great Britain.

Ivey vs. Hodges, 4 Hump., 155.

The judge may say the witness Jones has said so and so, and if you believe him, the law is so and so.

Claxton vs. The State, 2d Hump., 181.

In other words, the judge is to "declare the law." This gives him the unquestioned right, and it becomes his duty, in a suit where plaintiff's evidence fails to make out a case, to declare the law to be that he cannot recover.

Kasefang vs. R. R. Co. (mss.)
Sup. Ct. Tenn., Sept. Term, 1889.

In view of the principles enunciated in the foregoing treatises and decisions, and in view of what a jury trial is, according to the usage of the common law, where the provinces of both judge and jury are well understood and clearly defined, let us submit this section 3122 of the Tennessee Code to the test to see if it provides due process of law.

To permit the legislature by an enactment to say to a judge that the third verdict of a jury shall not be set aside by him, no matter if unsupported by evidence, but that he shall enter up judgment thereon, is arbitrarily to substitute their will, through the verdict of a jury, for the judgment of the court; thereby robbing him of any and all power in the premises. It simply makes him the unwilling instru-

ment of injustice, and he becomes nothing more nor less than a mere machine to execute the legislative will. Although the sole responsibility of entering up judgment devolves absolutely upon the judge, yet he is robbed of his conscience, his judgment, his knowledge of law, and his sense of justice. He is but the blind and brutal instrument by which *injustice* is *arbitrarily* perpetrated under the forms of law; and, because, forsooth, the law is general in its terms, this is called "due process of law."

If the legislature may enact that not more than two new trials shall be granted to the same party in an action at law, then they may lawfully enact that not more than *one* new trial shall be granted to the same party in such case; or even that *no new trial* shall be granted in an action at law; but that the finding of a jury upon any issue of fact, civil or criminal, shall be conclusive upon the parties and the court.

To illustrate: Suppose section 3122 read as follows: "No new trial shall be granted upon any issue of fact tried by a jury; and this section shall apply to both civil and criminal proceedings." Now, let us suppose that by reason of public clamor, popular prejudice or excitement, a defendant should be convicted of murder, upon evidence wholly insufficient; and that in obedience to this section the *nisi prius* judge should sentence the unfortunate victim to be executed; and that, upon appeal, the court of errors should hold that it, too, was bound by the prohibition contained in this section, and should affirm the sentence upon that ground alone, at the same time reciting in their judgment that the evidence was wholly insufficient to support the verdict of the jury; would this honorable court, upon a writ of error, permit the execution of such a defendant, by deciding that he had been deprived of his life, by "due process of law?" What judicial part would a judge play in such a proceeding? Would he amount to

anything more than a figure-head—signifying nothing? Would such a proceeding be in any sense "according to the course and usage of the common law?" Does it not take away from a judicial trial the very element which makes it judicial?" Is it not permitting the legislature, under the pretense of regulating practice or procedure, to *arbitrarily* make the finding of a jury upon an issue of fact, over-ride law and justice, and even take life, without the warrant or justification of law? There is no difference where only property is involved. The constitution protects life, liberty and property with the same shield and by the same words. To arbitrarily silence the judge, and practically enter his judgment for him, right or wrong, is no more due process of law, where property is at stake, than it is where life or liberty are in jeopardy.

After having thus closed the mouth of the court and made him a mere pawn, suppose the legislature were to go but one step further and take from the jury their undeniable right to pass upon the right of a plaintiff to recover at all, by enacting the following:

"Whenever an employee shall establish in any suit against his employer that he was injured while so employed in said service, he shall be entitled to such damages as he may show he has sustained, and the jury shall return a verdict therefor, and their verdict shall not be disturbed."

The practical result in the present case is precisely the same as if such a section were a part of the Code of Tennessee.

The Court of Appeals having twice set the verdict aside because there was no sufficient evidence to support it, the only material facts shown upon the third trial were the *employment* and the *injury. No negligence on the part of defendant is shown, no violation of law or of duty;* no reason why defendant's money should be taken from it and given to the plaintiff except that *three juries* have *arbitrarily* and

wrongfully said so. Can any legislation producing such practical results constitute due process of law, according to the course and usage of the common law? If so, then the legislature may make anything due process of law, so long as some sort of a trial is had, in which a man's defense is heard, but *disregarded;* where judges, by legislative command and direction, take A's money and give it to B, without the slightest pretense that B has shown any right to it, but solely because three juries have said he shall have it, right or wrong, evidence or no evidence. Mrs. Partington's definition of courts then becomes unhappily, but seriously, exact: "places *where justice is dispensed—with.*"

In the Federal Courts a judge may, and it is his duty, where the case justifies it under the decisions of this Court, to instruct or direct the jury to return a verdict for the defendant.

In Tennessee the power to direct a verdict *seems* to have been taken away by constitutional provision, but the power to *declare the law* still remains; and the deduction which we make as the principle of the decisions hereinbefore cited from, so far as they bear upon section 3122 of the Code of Tennessee, is this:

ANY ENACTMENT OF THE LEGISLATURE WHICH ROBS A COURT OF ALL POWER OVER THE VERDICT OF A JURY, AND WHICH COMPELS AND COMMANDS THE COURT TO ENTER UP JUDGMENT UPON THE VERDICT OF THE JURY, WHETHER OR NOT THERE IS EVIDENCE TO SUSTAIN IT, IS NOT "DUE PROCESS OF LAW." IN OTHER WORDS, ANY LEGISLATION WHICH, IN ITS PRACTICAL RESULTS, TAKES AWAY FROM THE COURT THE RIGHT TO DECLARE THE LAW UPON THE FACTS AS THEY APPEAR IN THE RECORD, AND SUBSTITUTES THE LEGISLATIVE WILL FOR THE JUDGMENT OF THE COURT, IS NOT "DUE PROCESS OF LAW."

By such enactment, the will of the legislature is arbitrarily substituted for the judgment of the court, which is no longer permitted to enter judgment according to justice and right, but only as the legislature directs. As has been very forcibly said by *Foster, J.*, "The words 'due process of law,' must be directed at something deeper than the mere rules and forms by which courts administer the law. They evidently were intended to guaranty and protect some *real* and *substantial right* to life, liberty and property as the ultimate result, and probably to prohibit any arbitrary and oppressive proceedings, by which the individual is deprived of either."

In re Ziebold, 19 Reporter, p. 743.

In the present instance, the plaintiff in error has been deprived of a substantial right by an arbitrary proceeding, which is not according to the course and usage of the common law, nor "according to those settled maxims, rules and forms established for the protection of private rights against the arbitrary exercise of power, unrestricted by established principles applicable to such rights, and to the administration of justice."

If counsel for plaintiff in error has not misapplied the principle of law which is embodied in the phrase "due process of law," and which has been incorporated into the National Constitution in the fourteenth amendment, then it is respectfully submitted and earnestly urged that the judgment of the Supreme Court of Tennessee is erroneous and should be reversed.

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Of Counsel.

NOTE.—There was no written opinion in this case by the Supreme Court of Tennessee, upon the last appeal, but the fact is, (and it will be not denied,) that Judges *Folkes* and *Snodgrass* joined in a